Douglas Ding Jangan & Ors v Kerajaan Negeri Sarawak & Ors

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(f)-42–11 OF 2018(Q)
ROHANA YUSUF, ZAWAWI SALLEH AND ABDUL RAHMAN SEBLI FCJJ
7 JULY 2021

Civil Procedure — Appeal — Cross-appeal — High Court after full trial allowed part of plaintiff's claim and dismissed the rest — Plaintiff appealed to Court of Appeal ('COA') against that part of its claim that was dismissed — Defendants filed cross-appeals against that part of High Court's decision that favoured plaintiff — COA dismissed plaintiff's appeal, allowed the cross-appeals and set aside the whole of the High Court's decision — Whether COA's decision was wrong — Whether notice of cross-appeal under r 8 of Rules of Court of Appeal 1994 ('RCA') could not be used to collaterally attack that part of trial court's decision which was not the subject of plaintiff's appeal — Whether defendants should have filed notices of appeal under r 5 of RCA if they wanted to set aside that part of trial court's decision that favoured plaintiff — Whether r 5 notice of appeal allowed COA to rehear whole matter and decide whether trial court's decision should be set aside or not — Whether r 8 notice of cross-appeal did not permit re-hearing but only allowed that part of trial court's decision that was appealed against by plaintiff to be varied — Whether notice of cross-appeal was restricted to what appellant was appealing against

Following a trial, the High Court granted judgment to the appellants against the first to the fifth respondents ('R1–R5') in respect of only para 25(i) of the appellants' statement of claim and dismissed the rest of their prayers in para 25. In para 25(i), the appellants sought a declaration that they had acquired native customary rights ('NCR') over, and were the lawful proprietors of, specific patches of certain cleared lands. The Court also granted consequential orders to give effect to the said declaration. Dissatisfied with the trial court's dismissal of their claim to the remaining areas of land set out in para 25, the appellants filed a notice of appeal to the Court of Appeal ('COA') against that dismissal. In response, R1–5 filed notices of cross-appeal, pursuant to r 8 of the Rules of the Court of Appeal 1994 ('the RCA'), in which they collaterally attacked the trial court's decision to grant para 25(i) and , in effect, sought to set aside that decision under the guise of seeking to 'vary' it. Before the appellants' appeal and the cross-appeals could be heard, the sixth to the eighth respondents ('R6–R8'), who were never parties to the litigation before the trial court, successfully intervened in the COA proceedings and similarly filed a notice of cross-appeal to 'vary' the trial court's decision. In fact, in their notice of cross-appeal, R6-R8 contended that the appellants did not have NCR over two pieces of cleared

lands specified in para 25(i) of the appellants' statement of claim — contrary to the decision of the trial court — and said that the court should instead declare that they had NCR over those lands. At the hearing of the appeal and the cross-appeals, the appellants raised the preliminary objection ('PO') that all the cross-appeals should be dismissed for being incompetent because they were unrelated to the subject-matter of the appellants' appeal and instead sought to set aside/reverse the entire decision of the trial court. The appellants submitted that if the respondents were dissatisfied with the trial court's decision with respect to para 25(i) and wanted to overturn it, they should have filed a notice of appeal pursuant to r 5 of the RCA and not filed a notice of cross-appeal. The COA dismissed both the PO and the appellants' appeal, held that the cross-appeals were 'connected to the substance of the appellants' appeal', set aside the entire decision of the High Court and allowed the reliefs prayed for in the cross-appeals — including those made by R6–R8 even though their claims were never adjudicated upon by the trial court because they were never parties to the proceedings at the trial. The COA ruled that the appellants had not established a claim to NCR over any of the lands specified in the appellants' statement of claim. The appellants were granted leave to appeal to the Federal Court on the question whether the COA had acted within its jurisdiction when, in determining the cross-appeals, it set aside the whole of the decision of the trial court including that part which favoured the appellants and which part was not the subject of any notice of appeal by any of the parties. The appellants argued that the leave question should be answered in the negative because: (a) the COA's jurisdiction in determining a cross-appeal under r 8 of the RCA was restricted to the substance or point in issue in the primary appeal brought by the appellants under r 5 of the RCA; and (b) all the cross-appeals in the instant case were incompetent because they, in effect, sought to challenge and set aside that part of the trial court's decision which had no connection to the subject of the appellants' appeal.

Held, unanimously allowing the appeal, answering the leave question in the negative, setting aside the COA's decision and restoring the decision of the High Court:

(1) The Rules of the Court of Appeal 1994 ('RCA') differentiated between appeals and cross-appeals. Appeals under r 5 were meant for re-hearing of decisions appealed against by the appellant, which decisions might be reversed or wholly set aside. Cross-appeals under r 8, on the other hand, were only meant for variation of the decisions that were appealed against and not for the total reversal or setting aside of such decisions. In the present case, the appellants' appeal was against that part of the trial court's decision which dismissed their claim for NCR over the remaining areas of land. It was not an appeal against that part of the decision that allowed para 25(i) of their statement of claim. The respondents' cross-appeals were therefore incompetent as they had no relation to the appeal brought

by the appellants but were directed at the decision to allow para 25(i) in respect of which there was no appeal before the COA for any variation order to be made under r 8 of the RCA, let alone a setting-aside order. The notices of cross-appeal were bad in law and of no effect (see paras 46–48 & 50).

(2) The High Court's decision to allow para 25(i) of the statement of claim was a finding that was wholly adverse to R1-R5. Those respondents should have filed notices of appeal if they wanted to reverse or set aside that decision. The decision could not be reversed or set aside by way of filing a cross-appeal under r 8 of the RCA. It could only be done by way of a substantive appeal under r 5 (see para 33).

(3) By not appealing against the decision of the High Court allowing para 25(i) of the statement of claim, the respondents must be deemed to have accepted the trial court's substantive finding of fact that the appellants and/or those whom they represented had acquired and/or created communal NCR over the cleared areas. This substantive finding of fact could not be reversed or set aside without a re-hearing by way of a substantive appeal under r 5 of the RCA. By not appealing against that decision, the respondents were estopped from contending that the decision was wrong and ought to be reversed or set aside (see para 40).

(4) R6-R8 were in a worse position than R1-R5 as they were not even parties in the High Court action. It was therefore grossly unfair to the appellants if a decision was made in favour of R6-R8 based on their cross-appeals when their claim for NCR rights over certain parts of the cleared lands — which the trial court decided in favour of the appellants after a full trial — was not even adjudicated upon by the High Court. The COA was wrong in allowing the cross-appeals of R6-R8 (see para 51).

(5) Although the notices of cross-appeal filed by the respondents sought to 'vary' the trial court's decision to allow para 25(i) of the statement of claim, the grounds in support of the cross-appeals in fact sought to set aside or reverse the entire decision of the High Court to allow para 25(i). For all intents and purposes, the notices were notices of substantive appeal under r 5 of the RCA disguised as notices of cross-appeal under r 8. It was not correct in law for the respondents to mount such a collateral attack on the trial court's decision without filing notices of appeal of their own under r 5 of the RCA. A cross-appeal under r 8 was only for the purpose of varying the decision of the High Court that was appealed against by the appellant and not for the purpose of reversing or setting aside any decision of the High Court which no party to the action had appealed against. The cross-appeal must relate to the appeal brought by the appellant and not otherwise and no variation order under r 8 could be made in respect of a non-existent appeal (see paras 35–37).

(6) Section 69(5) of the Courts of Judicature Act 1964 ('CJA') could not be interpreted to mean that the appellate jurisdiction of the COA extended to the setting aside of a decision of the High Court that was not the subject of a notice of appeal. Such construction would defeat the whole purpose of r 5 of the RCA read with s 69(1) of the CJA and render both provisions redundant and denuded of meaning. The COA's powers under s 69(5) was only to be exercised when the court was dealing with appeals under r 5 of the RCA and not when there was no appeal by the appellant (see paras 43–44).

[Bahasa Malaysia summary

Selepas perbicaraan, Mahkamah Tinggi membenarkan penghakiman memihak kepada perayu terhadap responden pertama hingga kelima ('R1–R5') berkaitan dengan perenggan 25(i) penyataan tuntutan pertayu dan menolak rayuan mereka yang lain dalam 25. Di perenggan 25(i), perayu memohon satu pengisytiharan bahawa mereka mempunyai hak adat asli ('NCR') terhadap, dan merupakan pemilik sah, beberapa tanah yang telah dikosongkan. Tidak berpuas hati dengan penolakkan hakim bicara akan tuntutan mereka berkaitan dengan tanah selebihnya dalam kawasan tanah yang dinyatakan di perenggan 25, perayu memfailkan notis rayuan kepada Mahkamah Rayuan ('MR') terhadap penolakkannya. Sebagai balasan, R1-5 memfailkan notis rayuan silang, selaras dengan k 8, Kaedah-Kaedah Mahkamah Rayuan 1994 ('KKMR'), yang mana mereka mencabar keputusan mahkamah bicara untuk membenarkan perenggan 25(i), dan sebagai kesan, cuba untuk mengetepikan keputusan tersebut di bawah samaran ingin mengubah keputusan mahkamah bicara. Walhal, dalam notis rayuan silang mereka, R6-R8 menyatakan bahawa perayu tidak mempunyai NCR terhadap dua bidang tanah yang dinyatakan dalam perenggan 25(i) penyataan tuntutan perayu — bertentangan dengan keputusan mahkamah bicara — dan menyatakan bahawa mahkamah sepatutnya mengisytiharkan bahawa mereka mempunyai NCR terhadap tanah tersebut. Sewaktu perbicaraan rayuan dan rayuan silang, perayu membangkitkan bantahan awal (PO) bahawa semua rayuanperenggan silang sepatutnya diketepikan kerana tidak kompeten kerana mereka tidak berkaitan dengan hal perkara rayuan perayu dan sepatutnya cuba untuk mengetepikan/menerbalikkan keseluruhan keputusan mahkamah bicara. Perayu menghujahkan bahawa sekiranya responden tidak berpuas hati dengan keputusan mahkamah bicara berkaitan dengan perenggan 25(i) dan cuba untuk menerbalikkannya, mereka sepatutnya memfailkan notis rayuan selaras dengan k 5 KKMR dan bukannya memfailkan rayuan silang. Mahkamah Rayuan mengetepikan PO dan rayuan perayu, memutuskan bahawa rayuan silang tersebut berkaitan dengan intipati rayuan perayu, mengetepikan keseluruhan keputusan Mahkamah Tinggi dan membenarkan rayuan yang dinyatakan dalam rayuan silang — termasuklah yang dibuat oleh R6 dan R8 walaupun ianya tidak pernah diputuskan oleh mahkamah bicara kerena mereka tidak merupakan pihak-pihak di prosiding sewaktu

perbicaraan. Mahkamah Rayuan memutuskan bahawa perayu tidak membuktikan tuntutan jeoada BCR terhadap apa-apa tanah yang dibutirkan dalam penyataan tuntutan perayu. Perayu telah dibenarkan izin untuk merayu ke Mahkamah Persekutuan atas persoalan sama ada MR telah bertindak didalam bidang kuasanya apabila dalam menentukan rayuan silang, telah mengetepikan keseluruhan keputusan mahkamah bicara termasuk di mana ianya memihak kepada perayu dan bahagian yang tidak merupakan subjek mana-mana notis rayuan oleh mana-mana pihak. Perayu menghujahkan bahawa soalan izin sepatutnya dijawab secara negatif kerana: (a) bidang kuasa MR dalam menentukan rayuan silang di bawah k 8 KKMR adalah terhad kepada isu atau hal pekara dalam rayuan utama yang dibawa oleh perayu di bawah k 5 KKMR; dan (b) semua rayuan silang dalam kes ini adalah tidak kompeten kerana mereka cuba untuk mencabar dan mengetepikan bahagian keputusan mahkamah bicara yang tiada kaitan dengan hal perkara rayuan perayu.

Diputuskan, sebulat suara membenarkan rayuan, menjawab keputusan izin secara negatif, mengetepikan keputusan Mahkamah Rayuan dan mengekalkan keputusan Mahkamah Tinggi:

(1) Kaedah-Kaedah Mahkamah Rayuan 1994 ('KKMR') membezakan antara rayuan dan rayuan silang. Rayuan dibawah s 5 bertujuan untuk pendengaran semula terhadap keputusan yang dirayu oleh defendan, yang mana keputusan tersebut boleh diterbalikkan atau diketepikan secara keseluruhannya. Rayuan silang dibawah k 8, hanya bertujuan untuk menukar keputusan yang dirayu terhadap dan bukannya untuk menerbalikkan atau mengetepikan keputusan sedemikian. Dalam kes ini, rayuan perayu adalah terhadap sebahagian daripada keputusan mahkamah bicara yang mengetepikan sebahagian daripada tuntutan mereka untuk NCR terhadap bahagian selebihnya tanah tersebut. Ianya bukan satu rayuan terhadap bahagian keputusan yang membenarkan perenggan 25(i) penyataan tuntutan. Rayuan silang perayu adalah oleh itu tidak kompeten kerana ianya tiada kaitan dengan rayuan yang dibawa oleh perayu kerana ianya berkaitan dengan keputusan untuk membenarkan perenggan 25(i) yang mana tiada rayuan dihadapan Mahkamah Rayuan untuk apa-apa perintah untuk menukar dibuat di bawah k 8 KKMR, apatah lagi perintah untuk mengetepikkan. Notis rayuan silang adalah salah disisi undang-undang dan tiada kesan (lihat perenggan 46–48 & 50).

(2) Keputusan Mahkamah Tinggi untuk membenarkan perenggan 25(i) penyataan tuntutan merupakan dapatan bahawa ianya tidak memihak kepada R1-R5 responden sepatutnya memfailkan notis rayuan sekiranya mereka ingin menerbalikkan keputusan tersebut. Keputusan tersebut tidak sepatutnya diterbalikkan atau diketepikan dengan cara memfailkan satu rayuan silang dibawah K 8 KKMR. Ianya hanya boleh dilakukan

dengan cara satu rayuan substantif dibawah k 5 (lihat perenggan 33).

(3) Dengan tidak merayu terhadap keputusan Mahkamah Tinggi membenarkan perenggan 25(i) penyataan tuntutan, responden dianggap telah menerima keputusan dan dapatan fakta substantif mahkamah tinggi dan/atau apa yang diwakili oleh mereka telah peroleh dan/atau mewujudkan NCR bersama terhadap kawasan yang telah dilapangkan. Dapatan fakta substantif tidak boleh diterbalikkan atau diketepikan tanpa pendengaran semula dengan cara pendengaran substantif di bawah k 5 KKMR. Dengan tidak merayu terhadap keputusan tersebut, responden diestop dairpada mencabar bahawa keputusan tersebut salah dan patut diterbalikkan atau diketepikan (lihat perenggan 40).

(4) R6-R8 berada dalam kedudukan lebih teruk memandangkan mereka bukan pihak dalam tindakan di Mahkamah Tinggi. Oleh yang demikian ianya adalah tidak adil kepada perayu sekiranya keputusan dibuat yang memihak kepada R6-R8 berdasarkan rayuan balas yang mana tuntutan mereka untuk hak NCR terhadap sebahagian daripada tanah yang dilapangkan tersebut — yang mana mahkamah bicara memutuskan memihak kepada perayu terhadap perbicaraan penuh — dan tidak dihakimi oleh Mahkamah Tinggi. MR terkhilaf dalam membenarkan rayuan silang R6-R8 (lihat perenggan 51).

(5) Walaupun notis rayuan silang difailkan oleh responden cuba untuk mengubah keputusan mahkamah bicara untuk membernarkan perenggan 25(i) penyataan tuntutan, alasan menyokong rayuan silang tersebut cuba untuk mengetepikan atau menerbalikkan keseluruhan keputusan Mahkamah Tinggi untuk membenarkan perenggan 25(i). Untuk semua sebab dan tujuan, notis tersebut merupakan notis rayuan substantif di bawah perenggan 5 KKMR yang disamar sebahai notis rayuan silang di bawah k 8. Ianya tidak sah disisi undang-undang untuk responden mencabar keputusan mahkamah bicara secara sandaran tanpa memfailkan notis rayuan mereka sendiri di bawah k 5 KKMR. Satu rayuan silang di bawah k 8 hanya untuk tujuan mengubah keputusan Mahkamah Tinggi yang dirayu oleh perayu dan bukannya bertujuan untuk menerbalikkan atau mengetepikan keputusan Mahkamah Tinggi yang bukannya pihak kepada tindakan yang dirayu terhadap. Rayuan silang mesti berkait dengan rayuan yang dibawa oleh perayu dan bukan sebaliknya dan tiada perintan untuk mengubah di bawah k 8 boleh dibuat berkaitan dengan satu rayuan yang tidak wujud (lihat perenggan 35–37).

(6) Seksyen 69(5) Akta Mahkamah Kehakiman 1964 ('Akta') tidak boleh ditafsir untuk bermaksud bahawa bidang kuasa rayuan MR juga membenarkannya untuk mengetepikan keputusan Mahkamah Tinggi dan tidak merupakan hal pekara notis rayuan. Penafsiran sedemikian akan menewaskan tujuan k 5 KKMR dibaca bersama s 69(5) Akta dan

akan menyebabkan kedua-dua peruntukan tidak diperlukan dan tanpa makna. Kuasa MR di bawah s 69(5) hanya boleh dilaksanakan apabila mahkamah berurusan dengan rayuan di bawah k 5 KKMR dan bukannya apabila tiada rayuan oleh perayu (lihat perenggan 43–44).]

Cases referred to

Bandur et al v Daiken et al [1967] 1 OR 629 (refd)
Cavender's Trusts, Re (1881) 16 Ch D 270, CA (refd)
Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights ('NCR') land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit) and other appeals [2017] 2 MLJ 281; [2017] 3 CLJ 1, FC (folld)
Johnston v Town of Petrolia Et Al [1897] 17 PR 332, CA (refd)
Kabushiki Kaisha Ngu v Leisure Farm Corp Sdn Bhd & Ors [2016] 5 MLJ 557 (refd)
Majlis Peguam v Cecil Wilbert Mohanaraj Abraham [2019] 5 MLJ 159, FC (refd)
National Society for the Distribution of Electricity by Secondary Generators v Gibbs [1900] 2 Ch 280, CA (refd)
National Westminster Bank Ltd v Humphrey [1983] Lexis Citation 985, CA (refd)
Parker (Deceased), Crow v Weston and Other [1948] NZLR 9, CA (refd)
R v Tonkin ex p Federated Ship Painters' Union [1954] ALR 777, HC (refd)
Rufa v R and another (2018) 92 WIR 46, CA (refd)
Sebag-Montefiore, Sebag Montefiore v Alliance Co Ltd, Re [1944] Ch 331, CA (refd)
Tabtill Pty & Ors v Creswick [2011] QCA 66, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 67(1), 69(1), (5)
Immigration Act (Cap 191) [BS] ss 22, 22(1), (3)
Rules of the Court of Appeal 1994 rr 5, 8, 8(1), (3)

Appeal from: Civil Appeal No Q-01–368–09 of 2014 (Court of Appeal, Putrajaya)

Ronald SL Ong (Paul Raja with him) (Sagau Raja & Co) for the appellant.
Hrrison ak Aris (Mohamad Fuad bin Ahmad with him) (Sarawak State Attorney General's Chambers) for the first, second and third respondents.
Tan Thiam Teck (George Lo & Partners) for the fourth respondent.
Gabriel Kok (Amanda Yong with him) (Khoo & Co) for the fifth respondent.
Paul Tang Nguong Wee (Rodney Voon See Yang with him) (Tan, Yap and Tang Advocates) for the sixth, seventh and eighth respondents.

Abdul Rahman Sebli FCJ (delivering judgment of the court):

[1] This appeal is against the decision of the Court of Appeal allowing the cross-appeals by the first to fifth respondents and setting aside the whole of the decision of the High Court which favoured the appellants. The cross-appeals by the sixth to eight respondents, who were interveners in the Court of Appeal but who were not parties to the High Court action, were also allowed by the Court of Appeal.

[2] The appellants obtained leave on 24 October 2018 for the determination of the following question of law:

> Whether the Court of Appeal acted within its jurisdiction when it set aside the whole of the order or decision of the High Court, including that part which decided that 'the Plaintiffs have acquired and/or created communal native customary rights over the said land and are still the lawful proprietors of the same for the specific patches of cleared areas labeled as No. 4, 5, 9, 16, 25, 36, 37, 38 and 39 in exhibit D80 and the cleared area labeled as No. 27 in exhibit D81' and which is not appealed against, in determining the cross appeals brought by the defendants and the interveners?

[3] It is a jurisdictional challenge over the decision of the Court of Appeal to set aside the decision of the High Court on cross-appeals by the respondents/interveners although no appeal pursuant to r 5 of the Rules of the Court of Appeal 1994 ('the RCA') was filed by the first to fifth respondents against the decision of the High Court to allow para 25(i) of the statement of claim.

[4] The facts as set out by the appellants, with the necessary modifications, are largely undisputed and they are as follows. In the High Court action, the appellants pleaded that since time immemorial, their ancestors, descendants and themselves have been occupying and practising native customary rights over the native customary rights ('NCR') land which is known as 'tana' daleh' in their dialect. They claimed NCR over the whole area of land edged in red ink in three community maps marked at the trial as exhs P27, P28 and P29.

[5] The appellants claimed encroachment and trespass on their NCR land by both the fourth respondent's licence for planted forest No LPF/0013 and the fifth respondent's provisional lease, Lot 10 Punan Land District, which were issued by the second and third respondents respectively as agents of the first respondent. The first to fifth respondents contested the appellants' claim.

[6] The appellants' claim against the first to fifth respondents was tried over a period of 22 days with witnesses called and examined. On 8 August 2014, the learned trial judge decided partially in favour of the appellants by allowing para

25(i) of the statement of claim, which was for a declaration that the appellants have acquired and/or created NCR and are still the lawful proprietors of the specific patches of cleared land areas labeled as No 4, 5, 9, 16, 25, 36, 37, 38 and 39 in exh D80 and the cleared area labeled as No 27 in exh D81 (hereinafter referred to as 'the cleared areas'), and consequential orders to give effect to the declaration.

[7] It was a decision that was adverse to the first to fifth respondents but they did not appeal against the decision to have it set aside. What they did was to purportedly apply for a variation of the decision by way of cross-appeal under r 8 of the RCA after the appellants had filed an appeal against that part of the decision of the High Court that dismissed their claim for the balance of the land areas. The first to fifth respondents' notices of cross-appeal were filed on 7 November 2014 (first to third respondents), 31 October 2014 (fourth respondent), and 5 November 2014 (fifth respondent).

[8] Except for para 25(i), the rest of the prayers in para 25 of the appellants' statement of claim were dismissed by the High Court. We reproduce below the orders, inter alia, made by the High Court:

(1) that the appellants' prayers in para 25 of the statement of claim dated 18 August 2010 were dismissed except for prayer 25(i) declaring that the appellants have acquired and/or created communal NCR over the cleared areas;

(2) that the exact perimeter and areas of the cleared areas were to be confirmed by a ground survey to be jointly carried out by the appellants and the respondents; and

(3) that the application for a title to be issued to Uma Long Bangan in respect of the cleared areas.

[9] Dissatisfied with that part of the decision of the High Court that dismissed their claim for the balance of the land areas, the appellants filed a notice of appeal dated 3 September 2014 against that part only of the decision. It was an appeal filed pursuant to r 5 of the RCA.

[10] What is important to note in this regard is that the appellants did not appeal against any part of the decision that declared that they have acquired and/or created communal NCR and are still the lawful proprietors of the cleared areas, and the consequential orders thereto.

[11] Neither did the first to fifth respondents appeal against any part of that decision although it was adverse to them. What this means is that all parties to the action were satisfied with the decision of the High Court to allow para 25(i) of the appellants' statement of claim.

A **[12]** Before the appeal by the appellants and the cross-appeals by the first to fifth respondents came up for hearing at the Court of Appeal, the sixth to eight respondents applied to intervene. Their application was allowed by the Court of Appeal. Their notice of cross-appeal was filed on 6 May 2016.

B **[13]** At the hearing of the appeal and cross-appeals, the appellants raised a preliminary objection that the respondents' and interveners' cross-appeals, which sought to set aside the entire decision of the High Court which was favourable to them (in respect of the cleared areas) were incompetent as the setting aside or reversal of that decision could only be taken up by way of C notices of appeal under r 5 of the RCA. Reliance was placed on the decision of this court in *Kabushiki Kaisha Ngu v Leisure Farm Corp Sdn Bhd & Ors* [2016] 5 MLJ 557 ('Leisure Farm').

D **[14]** Rule 5 of the RCA provides as follows:

> Rule 5 Appeal to be by re-hearing on notice
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> (1) Appeals to the Court shall be by way of re-hearing and shall be brought by giving notice of appeal.
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> E (2) A notice of appeal shall substantially be in Form 1 in the First Schedule.
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> (3) Any appellant may appeal from the whole or part of a judgment or order and the notice of appeal shall state whether the whole or part only, and what part, of the judgment or order is complained of.

F **[15]** It was the appellants' contention that all the cross-appeals, which sought to reverse or set aside the decision of the High Court allowing para 25(i) of their statement of claim must be dismissed as they were unrelated to their appeal, which was only against that part of the decision of the High Court that G dismissed their claim for the balance of the land areas.

[16] Having heard and considered the competing arguments of the parties, the Court of Appeal decided as follows:

H (a) dismissed the appellants' preliminary objection against the respondents' and the interveners' respective notices of cross-appeals and held that the cross-appeals were 'connected to the substance of the plaintiffs' appeal', relying on the English case of *Re Cavender's Trusts* (1881) 16 Ch D 270 which was referred to in *Leisure Farm.*

I (b) dismissed the appellants' appeal for the balance of the area claimed by applying the decision of this court in *Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights ('NCR') land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan*

Kanowit) and other appeals [2017] 2 MLJ 281; [2017] 3 CLJ 1;

(c) did not vary the High Court decision, but set aside the whole order of the High Court. In para (b) of the Court of Appeal order dated 8 February 2018, it was ordered in no uncertain terms that 'The order of the High Court is set aside'. Further, in para [58] of the judgment, it was held that 'The order of the High Court was set aside';

(d) allowed the reliefs prayed for by the respondents in their respective cross-appeals in respect of the cleared areas which the appellants did not appeal against in their notice of appeal dated 3 September 2014; and

(e) allowed the prayers claimed by the interveners in their cross-appeal in respect of their alleged NCR over certain patches of the cleared areas which were already awarded by the High Court to the appellants and which the appellants did not appeal against in their notice of appeal dated 3 September 2014. This was notwithstanding the fact that the interveners were not parties to the proceedings in the High Court and their claim for such rights were not adjudicated upon by the High Court.

[17] The basis for the Court of Appeal's decision to allow the respondents' cross-appeals and to dismiss the appellants' appeal is encapsulated in the following paragraphs of the judgment:

> [46] Having perused the records of appeal, we found that the evidence led by the plaintiffs were not sufficient to establish a claim over the said lands labeled as No. 4, 5, 9, 16, 25, 36, 37, 38 and 39 in exhibit D80 and labeled as No. 27 in exhibit D81. The plaintiffs have not proved that they or their ancestors had cleared those specific areas shown in exhs D80 and D81.
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> [49] In light of the learned judge's express finding that the NCR would have been created, acquired and/or inherited in the Batang Belaga areas by Kayan, Kenyah, Lahanan, Penan and Iban, it cannot be said that the plaintiffs have proved, on a balance of probabilities their NCR claim for the land.

[18] It is clear that the Court of Appeal's decision was grounded on its finding that the appellants failed to establish not only their claim over the balance of the land areas but also their claim over the cleared areas which the High Court had squarely decided in favour of the appellants. The Court of Appeal had thus overturned the substantive finding of fact by the High Court that the appellants have established their claim over the cleared areas.

[19] The appellants proffered two main reasons why the leave question ought to be answered in the negative, as follows:

(a) the Court of Appeal's jurisdiction in determining a cross-appeal under r 8 of the RCA is restricted to the substance or point in issue in the primary appeal brought under r 5 of the RCA; and

(b) all the cross-appeals sought to challenge and set aside that part of the decision of the High Court which was unconnected to the substance of the appellants' primary appeal and were therefore incompetent.

[20] The position taken by all eight respondents was that the Court of Appeal was seized with jurisdiction to set aside the entire decision of the High Court in allowing para 25(i) of the statement of claim although the first to fifth respondents did not file any appeal against the decision pursuant to r 5 of the RCA.

[21] We shall first deal with the submissions of the first, second and third respondents. The contention was that in order to determine whether the respondent to an appeal should file a cross-appeal or a separate notice of appeal, the issue should be resolved in the following manner:

(a) if the cross-appeal is directed at a party other than the appellant, a separate appeal must be filed (*Re Cavender's Trusts* (1881) 16 Ch D 270; *Johnston v Town of Petrolia Et Al* [1897] 17 PR 332; *Tabtill Pty Ltd & Ors v Creswick* [2011] QCA 66);

(b) if the cross-appeal concerns the appellant, but the appeal and the cross-appeal are based on different causes of action, then a separate appeal must be filed, even if they arise from the same transaction or situation (*National Society for the Distribution of Electricity by Secondary Generators v Gibbs* [1900] 2 Ch 280);

(c) if the subject matter of the cross-appeal does not match that of the appeal, then a cross-appeal is inappropriate (*Tabtill Pty & Ors v Creswick* [2011] QCA 66); and

(d) if the orders arise from the same cause of action, there should be no separate appeal but a notice of cross-appeal (*Bandur et al v Daiken et al* [1967] 1 OR 629).

[22] Next, the submission of the fourth respondent, which in substance is as follows:

(a) it is not necessary for a respondent to file a notice of appeal. What is needed is for the respondent to file and serve the notice of cross-appeal on the appellant and any other party who may be affected by such cross-appeal (r 8 of the RCA);

(b) the only instance when a respondent has to file a notice of appeal is where the appeal is withdrawn or where a notice of appeal is withdrawn or

where a notice of appeal is given but the appeal is not filed within the prescribed time limit and the respondent has yet to file a cross-appeal; A

(c) *Leisure Farm* was wrongly decided, is bad law and should be overruled as it wrongly restricted the scope of a cross-appeal and had failed to appreciate the opening words of r 8 of the RCA that 'It shall not be necessary for a respondent to give notice of appeal' and instead wrongly focusing its mind on the word 'vary' which means change, make different or modify (*The Concise Oxford Dictionary*); B

(d) the fourth respondent's cross-appeal raised matters which affected the appellants and were connected to the substance of the appellants' appeal; and C

(e) in any event, *Leisure Farm* is distinguishable from the facts of the present case in that the fourth respondent was only cross-appealing to vary that part of the High Court decision which decided that the appellants have acquired NCR over the cleared areas or part thereof. D

[23] As for the fifth respondent, the submission was that the cross-appeal was proper as the appellants' appeal and its cross-appeal were in respect of the same prayer 25(i) of the statement of claim, part of which was not granted and part of which was granted and that the appeal and cross-appeal were both connected to the singular piece of property, ie exhs D80 and D81. Further, the appellants and the fifth respondent have a clear interest in the same various patches of land as shown in exhs D80 and D81. With regard to *Leisure Farm*, it was submitted that this court had 'overreached' the principle enunciated in *Re Cavender's Trusts*. E F

[24] Lastly, the submissions of the sixth to eight respondents. First and foremost it was argued, rather strangely we would say, that the words 'it shall not be necessary' in r 8(1) of the RCA makes it 'mandatory' that a respondent does not file a notice of appeal under r 5 for the purpose of setting aside a judgment of the High Court. G

[25] Learned counsel further submitted that this court in *Leisure Farm* was wrong in holding that where the respondent wishes to raise matters which are unconnected with the substance of the appeal by the appellant, the respondent must proceed by way of a separate notice of appeal. According to learned counsel, the proposition should be varied to the extent: 'that an appeal on a point which does not affect the original appellant cannot be by a cross-appeal'. H I

[26] To drive home the point, counsel gave the following example — the cross-appeals by the respondents for an order that the appellants have not acquired NCR and instead it was the respondents who had acquired NCR over the cleared areas in exh D80 will affect the appellants although the appellants

A did not appeal against the High Court decision that the appellants had acquired such NCR. Like the other respondents, learned counsel cited various foreign authorities to support the proposition, including those from Australia, New Zealand and India.

B **[27]** We do not wish to delve into those foreign authorities cited by the respondents save to say that they were decided in the context of the peculiar facts and circumstances of the cases and the laws prevailing in those jurisdictions. Anyway, in the case of *Ceswick* cited by the first to third respondents, it was decided that if the subject matter of the cross-appeal does C not match that of the appeal, then a cross-appeal is inappropriate. Likewise in the case of *Parker (Deceased), Crow v Weston and Other* [1948] NZLR 9 cited by the sixth to eight respondents, where it was held, inter alia, by the New Zealand Court of Appeal that if any matter is to be raised by the respondent on appeal that is not in issue as a result of the appellant's notice of appeal, a D substantive appeal must be lodged by such respondent.

[28] Counsel for the sixth to eight respondents however pointed out that the proposition of law in *Re Parker* was in fact the submission of counsel for the E respondent and not the pronouncement of the court and that this court in *Leisure Farm* was therefore wrong to have relied on it.

[29] With due respect, we find nothing of substance to the argument. As officers of the court whose duty to the court is paramount, counsel's duty first F and foremost is to assist the court in arriving at a correct decision. If accepted, the proposition of law advanced by counsel would be adopted and it becomes the court's pronouncement. It does not matter that the proposition comes from counsel. What matters is that it becomes the judgment of the court. There is some truth to the saying that good judgments come from good submissions.

G

[30] In our jurisdiction, the law on cross-appeals and their restrictions had been laid down by this court in *Leisure Farm,* which was endorsed by another decision of this court in *Majlis Peguam v Cecil Wilbert Mohanaraj Abraham* [2019] 5 MLJ 159, albeit by way of obiter. In that case, the plaintiff's appeal H was only against that part of the judgment of the High Court that granted it damages in lieu of specific performance. In other words, the plaintiff's dissatisfaction was only over the decision of the High Court not to grant the order of specific performance that it prayed for. The first defendant did not appeal against the decision of the High Court that the plaintiff had proven its I case that there was a binding contract between the parties for the sale and purchase of the golf course land.

[31] It was held, inter alia, that if the first defendant wanted the Court of Appeal to reverse or set aside the High Court decision or substantive finding of

fact that there was a valid and binding contract between the parties for the sale of the golf course, it was incumbent on the first defendant to independently file a separate notice of appeal under r 5 of the RCA to rehear the issues that were not decided in its favour rather than to file a notice of cross-appeal under r 8 of the RCA which did not provide for a complaint to be re-heard — A cross-appeal cannot be recast as an appeal in itself to set aside the judgment of the High Court.

[32] To better appreciate *Leisure Farm*, perhaps it is useful to reproduce the following parts of the judgment:

> [12] It is not disputed that the first defendant is entitled to have a 're-hearing' of the case before the Court of Appeal by way of a notice of appeal. It is our judgment, given the fact that the first defendant had not filed a separate notice of appeal, the plaintiff therefore had rightly raised a preliminary objection against the first defendant's cross-appeal which is *recast as an appeal in itself to set aside the judgment of the High Court*.
>
> ...
>
> [23] We are of the view that under r 8 of the RCA 1994 the first defendant cannot set aside the substantive finding of facts made by the High Court by way of notice of cross-appeal. The first defendant may only set aside the substantive findings of the High Court by way of filing a notice of appeal under r 5 of the RCA 1994. Only an appeal by way of a notice of appeal constitutes a re-hearing.
>
> ...
>
> [26] This was also consistent with the scheme of things, as we viewed it, envisaged under r 5 of the RCOA 1994. There it was provided for an appeal to be lodged against the whole or part of any judgment or order of court and such an appeal (in contrast to a cross-appeal) was by a re-hearing. The word 're-hearing' used here clearly anticipated a review or regurgitation before the appeal court of all points and arguments taken at the court below. Hence if it was the substantive finding of the court that was intended to be attacked, it behoved upon the party aggrieved to file a proper notice of appeal (Form 1 off the RCOA 1994 also refers).
>
> ...
>
> [35] We noted in the present case that the High Court in its decision had made a finding that there was in existence a valid contract between the plaintiff and the first defendant. The orders of the High Court that the first defendant pay damages in lieu of specific performance was the result of the principal finding that there was a binding contract between the plaintiff and the first defendant. As for the plaintiff, its appeal was only brought against a part of the decision of the High Court in ordering the first defendant to pay damages instead of granting specific performance.
>
> [36] It would appear that none of the parties in this case appealed against the entire decision of the High Court. The first defendant had failed to appeal against the finding of the High Court that the HK MOU was a binding contract. *The High*

A *Court's decision that there was a valid and binding agreement concluded between the plaintiff and the first defendant is adverse against the first defendant. It was thus incumbent on the first defendant to file a separate notice of appeal if it wanted the aforesaid decision to be reversed or set aside, rather than by filing a notice of cross-appeal.* The operative words of 'to contend' and 'decision of the High Court should be
B varied' under r 8(1) of the RCA 1994 clearly limits the contentions under a notice of cross-appeal to effectively vary a decision, not set aside a judgment or order. It is incumbent on the first defendant to independently file a notice of appeal under r 5 of the RCA 1994 to rehear the issues that were not decided in the first defendant's favour. A notice of cross-appeal does not provide for a complainant to be re-heard.
C The first defendant is at liberty to file an independent appeal under s 67(1) of the CJA 1964.

In construing r 8 and Form 2 of the RCA, the Court of Appeal had rightly held that the word 'vary' by itself should be given its ordinary and natural meaning to mean change, make, different, modify'. The Court of Appeal was also right in holding that
D r 5 of the RCA provided for an appeal to be lodged against the whole or part of any judgment or order of court and that such an appeal in contract to a cross-appeal was by way of rehearing.

The first defendant ought to have filed an independent notice of appeal as a notice of cross-appeal did not provide for a complaint to be reheard. Under r 8 of the RCA
E the first defendant could not set aside the substantive finding of facts made by the High Court by way of notice of cross-appeal. The first defendant could only set aside the substantive findings of the High Court by way of filing a notice of appeal under r 5 of the RCA as only an appeal by way of a notice of appeal constituted a rehearing.

F The operative words of 'to contend' and 'decision of the High Court should be varied' in r 8 of the RCA clearly limited the contentions under a notice of cross-appeal to effectively vary the decision, not set aside a judgment or order. It was incumbent on the first defendant to independently file a notice of appeal under r 5 of the RCA to rehear the issues that were not decided in the first defendant's favour
G as a notice of cross-appeal did not provide for a complaint to be re-heard. (Emphasis added.)

[33] Juxtaposed with the facts of the present case, the High Court's finding that the appellants have acquired and/or created communal NCR over the
H cleared areas, which formed the basis for its decision to allow para 25(i) of the statement of claim, was a finding that was wholly adverse to the first to fifth respondents. It was therefore incumbent on the first to fifth respondents to file separate notices of appeal if they wanted the decision to be reversed or set aside. The decision cannot be reversed or set aside by way of cross-appeal under r 8 of
I the RCA. It can only be done by way of a substantive appeal under r 5.

[34] The question that calls for consideration is whether there is any connection between the respondents' cross-appeals and the appellants' appeal. The Court of Appeal had decided that the cross-appeals were 'connected in

substance' to the appellants' appeal. It is necessary therefore to examine the reliefs sought by the respondents in their notices of cross-appeal and the reliefs sought by the appellants in their notice of appeal to see if there is any link between the subject matter of the appellants' appeal and the subject matter of respondents' cross-appeals:

The Appellants' Notice of Appeal

'NOTICE OF APPEAL

TAKE NOTICE that the above-named Appellants Douglas Ding Jangan, Takap Sabuk, Jalong Ugat, Stephen Lusat and Micheal Jok together with all the residents of Uma Long Bangan, Long Bangan, Sg. Belaga, 96900 Belaga, Sarawak being dissatisfied with the decision of the Honourable Judge Tuan Stephen Chung Hian Guan given in the High Court of Sabah and Sarawak at Bintulu on eight day of August 2014 appeals to the Court of Appeal against the said decision which dismissed the Plaintiffs' claim except for prayer 25(i) of the Statement of Claim over the lands labeled as No. 4, 5, 9, 16, 25, 36, 37, 38 and 39 in D80 and labeled as 27 in D81.'

The first, second and third Respondents' Notice of Cross-Appeal

'NOTICE OF CROSS-APPEAL

'TAKE NOTICE that at the hearing of the above appeal, GOVERNMENT OF SARAWAK, DIRECTOR OF FORESTS AND SUPERINTENDENT OF LANDS & SURVEY, KAPIT, the first, second and third Respondents above-named respectively, will contend that the decision of the Honourable Mr. Justice Stephen Chung Hian Guan given on eight day of August 2014 ought to be varied to the extent and on the grounds hereinafter set out:

(1) *Nature of the relief claimed in this cross appeal:*

(a) That the Appellants and/or those whom they claim to represent, have not lawfully acquired or have not acquired at all native customary rights over the cleared areas labeled as No. 38 and No. 39 in Exhibit D-80 or any part thereof.

(b) That the Appellants and/or those whom they claim to represent have not lawfully acquired or have not acquired at all native customary rights over the cleared areas labeled as No. 9, No. 25, No. 36 and No. 37 in Exhibit D-80 or any part thereof.

(c) That there is no evidence that the Appellants and/or those whom they claim to represent had protested or objected to logging within the claimed area.

(2) *Grounds in support of the nature of relief claimed in this cross-appeal As to relief 1(a)*

As to relief 1(a)

2.1 There is no admissible evidence or corroborative evidence that the ancestors of the Appellants or those whom they claim to represent, cleared and/or farmed any part of the cleared areas labeled as No. 38 and No. 39 in Exhibit D-80.

2.2 There is no admissible or corroborative evidence that the ancestors of the Appellants or those whom they claim to represent had settled at the alleged first longhouse site at Leteng as shown in exhs P-27, P-28 and P-29.

2.3 That the cleared areas labeled as No. 38 and No. 39 in Exhibit D-80 were applied by Temenggong Dato Sri Nyipa Bato of *Uma/Rh Kahei* (which is a different longhouse from Long Bangan) to be developed and was approved by the relevant authority to be developed in accordance with the New Concept of Development of Native Customary Rights Land (*Konsep Baru Pembangunan Tanah Hak Adat Bumiputera*).

2.4 That the cleared areas labeled as No. 38 and No. 39 in Exhibit D-80 are not within the area stated as Long Bangan's land in Penghulu Surat Kuja's application dated 19th July 2004 for such land to be planted with oil palm.

As to relief 1(b)

2.5 There is no admissible evidence or corroborative evidence that the ancestors of the Appellants or those whom they claim to represent had cleared and/or farmed any part of the cleared areas labeled as No. 9, No. 25, No. 36 and No. 37 in Exhibit D-80.

2.6 There is no admissible evidence or corroborative evidence that the ancestors of the Appellants or those whom they claim to represent had settled at the alleged second longhouse site at Lulau Batu Semiteng as shown in exhs P-27, P-28 and P-29.

As to relief 1(c)

2.7 There is no evidence that the Appellants or those whom they claim to represent had lodged any police report or complaint against the licensee(s) of the various timber licences issued over the claimed area, or their contractors.

Dated this 7th day of November, 2014.

The fourth Respondent's Notice of Cross-Appeal

NOTICE OF CROSS-APPEAL

Take notice that at the hearing of the above appeal, PUSAKA KTS FORESTS PLANTATION SDN. BHD, the fourth Respondent above-named, will contend that the decision of the Honourable Mr Justice Stephen Chung Hian Guan given on the eight day of August 2014 ought to be varied to the extent and on the grounds hereinafter set out:-

(1) *Nature of the relief claimed in this cross appeal:*

(a) That the Appellants and/or those whom they claim to represent have not acquired native customary rights over any part of the cleared areas labeled as No. 38 and No. 39 in Exhibit D-80.

(b) That the Appellants and/or those whom they claim to represent have not acquired native customary rights over any part of the cleared areas labeled as No. 9, No. 25, No. 36 and No. 37 in Exhibit D-80.

(c) That there is no evidence that the Appellants and/or those whom they claim to represent had protested or objected to logging within the claimed area.

(2) *Grounds in support of the nature of relief claimed in this cross-appeal As to relief 1(a)*

2.1 There is no admissible evidence or corroborative evidence that the ancestors of the Appellants or those whom they claim to represent have cleared and/or farmed any part of the cleared areas labeled as No. 38 and No. 39 in Exhibit D-80.

2.2 There is no admissible or corroborative evidence that the ancestors of the Appellants or those whom they claim to represent had settled at the alleged first longhouse site at Leteng as shown in exhs P-27, P-28 and P-29.

2.3 That the cleared areas labeled as No. 38 and No. 39 in Exhibit D-80 were applied by Temenggong Dato Sri Nyipa Bato of *Uma/Rh Kahei* (which is a different longhouse from Long Bangan) to be developed and was approved by the relevant authority to be developed in accordance with the New Concept of Development of Native Customary Rights Land (*Konsep Baru Pembangunan Tanah Hak Adat Bumiputera*).

2.4 That the cleared areas labeled as No. 38 and No. 39 in Ehibit D- 80 are not within the area stated as Long Bangan's NCR land in Penghulu Surat Kuja's application dated 19th July 2004 for such land to be planted with oil palm.

As to relief 1(b)

2.5 There is no admissible evidence or corroborative evidence that the ancestors of the Appellants or those whom they claim to represent had cleared and/or farmed any part of the cleared areas labeled as No. 9, No. 25, No. 36 and No. 37 in Exhibit D- 80.

2.6 There is no admissible evidence or corroborative evidence that the ancestors of the Appellants or those whom they claim to represent had settled at the alleged second longhouse site at Lulau Batu Semiteng as shown in exhs P-27, P-28 and P-29.

As to relief 1(c)

2.7 There is no evidence that the Appellants or those whom they claim to represent had lodged any police report or complaint against the licencee(s) of the various timber licences issued over the claimed area or their contractors.

Dated this 3first October 2014.'

The fifth Respondent's Notice of Cross-Appeal

'NOTICE OF CROSS-APPEAL

Take notice, that on the hearing of the above appeal, SOP Plantations (Borneo) Sdn. Bhd., the fifth Respondent abovenamed, will contend that the decision of the Honourable Justice Tuan Stephen Chung Hian Guan given at Bintulu on 8 August 2014 ought to be varied to the extent and on the grounds hereinafter set out:-

(a) nature of the relief claimed:-

A

i. The learned High Court Judge erred when his Lordship ruled that the Appellants/Plaintiffs have acquired native customary rights over the specific patches of areas of land labeled as No. 4, 5, 9, 16, 25,36, 37, 38 and 39 in Exhibit D80 and lebeled as No. 27 in Exhibit D81.

B

ii. The learned High Court Judge erred when His Lordship ordered that these specific patches of areas of land abovenamed be confirmed by a joint ground survey, and that a title be issued to Uma Long Bangan in respect of these areas of land.

(b) the grounds relied upon:-

C

i. It was the Appellants' evidence that their present longhouse settlement site, and also their previous/old longhouse sites lie outside of the fifth Respondent's Lot 10 Punan Land District.

D

ii. As a matter of fact, evidence and prevailing law, the Appellants have not acquired native customary rights over any of the specific patches of areas of land abovementioned. Further, any rights which the Appellants may have, had become statute barred by the time the Suit was filed.

E

iii. The Appellants' evidence admitted that they do not represent all the inhabitants of Uma Long Bangan. Further, not all the inhabitants of Uma Long Bangan are Kenyah nor natives of Sarawak. Therefore, to make an order that a land title of the specific patches of land 'to be issued to Uma Long Bangan' would be legally and practically impossible. The registeredi proprietor of native land cannot be that of the name of a settlement or village, nor can the registered proprietor be that of an indeterminate longhouse which includes non-natives of Sarawak.

F

Dated 6 November 2014.'

The 6th, 7th and 8ht Respondents' (Interveners) Notice of Cross-Appeal

NOTICE OF CROSS-APPEAL

G

Take notice that at the hearing of the above appeal, MU KEDOH TAJANG, SITING LAWAI, AVIT JAWI acting on behalf of themselves and all the residents of Uma Kahei, Long Mekero, 96900, Belaga, Sarawak, the sixth, 7th and eight Respondents above-named, will contend that the decision of the Honourable Mr Justice Stephen Chung Hian Guan given on eight day of August 2014 ought to be

H

varied on the grounds hereinafter set out:-

(1) *Nature of the relief claimed in this cross-appeal:*

(a) That the Appellants and/or those whom they claim to represent have not acquired native customary rights over any part of the cleared areas labeled as No. 38 and No. 39 in Exhibit D-80.

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(b) That the sixth, 7th and eight Respondents and/or those whom they are acting for and represent have acquired native customary rights over the cleared areas labeled as No. 38 and No. 39 in Exhibit D80.

(2) *Grounds in support of the nature of relief claimed in this cross-appeal As to relief 1(a)*

2.1 There is no admissible evidence or corroborative evidence that the ancestors of the Appellants or those whom they claim to represent have cleared and/or farmed any part of the cleared areas labeled as No. 38 and No. 39 in Exhibit D-80.

As to relief 1(b)

2.2 That the sixth, 7th and eight Respondents have acquired Native Customary Rights over all the cleared area labeled as No. 38 and No. 39 in Exhibit D80 by:-

(a) the sixth, 7th and eight Respondents' ancestors having first entered and farmed in the cleared area labeled as No. 38 and No. 39 in exhs D80 since the 1800s and which cleared area had been continued to be farmed by the sixth, 7th and eight Respondents' ancestors and the sixth, 7th and eight Respondents till the present date;

(b) the evidenced of the sixth, 7th and eight Respondents' ancestors' old *luvong* site at the confluence of Sungai Belaga and Sungai Aa (Sungai Pih);

(c) the present *luvong* of Uma Kahei at Long Sema'ak within the cleared area labeled as No. 38 and No. 39 in Exhibit D80;

(d) the fruit trees planted since the time of *Lake*' Utah and Bayo Ngo who are the ancestors of the sixth, 7th and eight Respondents in the cleared area labeled as No. 38 and No. 39 in Exhibit D80;

(e) the graves of some of the sixth, 7th and eight Respondents' ancestors and elders who having farmed, hunted, fished and collected jungle produce, in the cleared area labeled as No. 38 and No. 39 in Exhibit D80 and who died and were buried in the graves at the confluence of Sungai Belaga and Sungai Aa (Sungai Pih) shown in Exhibit 'SL-8' and 'SL-12';

(f) the *talun* (*temuda*) of the present residents of Uma Kahei in the cleared area labeled as No. 38 and No. 39 in Exhibit D80 which were inherited from their ancestors; and/or

(g) continuously occupying the cleared area labeled as No. 38 and No. 39 in Exhibit D80 since the time of the first entry by the sixth, 7th and eight Respondents' ancestors in the 1800s.

2.3 That the cleared areas labeled as No. 38 and No. 39 in Exhibit D-80 were applied by Temenggong Dato Sri Nyipa Bato of *Uma/Rh Kahei* (which is a different longhouse from Long Bangan) to be developed and was approved by the relevant authority to be developed in accordance with the New Concept of Development of Native Customary Rights Land (*Konsep Baru Pembangunan Tanah Hak Adat Bumiputera*).

2.4 That the cleared areas labelled as No. 38 and No. 39 in Exhibit D-80 are not within the area stated as Long Bangan's NCR land in Penghulu Surat Kuja's application dated 19th July 2004 for such land to be planted with oil palm.

Dated this sixth day of May, 2016.

[35] It will immediately be seen that although the notices of cross-appeal sought for a variation of the High Court decision allowing para 25(i) of the

A statement of claim, the grounds in support of the cross-appeals in fact sought for a completely different order. Far from asking for a variation of the decision, the respondents were actually seeking for an order that the entire decision of the High Court to allow para 25(i) of the statement of claim be reversed or set aside.

B

[36] For all intents and purposes, the notices were notices of substantive appeal under r 5 of the RCA disguised as notices of cross-appeal under r 8. This is clear from the contents of the notices and made clearer by the basis on which the cross-appeals were filed — that there is no evidence to support the learned C trial judge's finding that the appellants and/or those whom they represent have acquired and/or created NCR over the cleared areas or some patches of the cleared areas shown in exh D80 or D81 or both D80 and D81, contrary to the finding of the High Court.

D

[37] We do not find it to be correct in law for the respondents to mount such collateral attack on the decision of the High Court without filing notices of appeal of their own under r 5 of the RCA. A cross-appeal under r 8 of the RCA is only for the purpose of varying the decision of the High Court that is appealed against by the appellant and not for the purpose of reversing or setting E aside any decision of the High Court which no party to the action appeals against. The cross-appeal must relate to the appeal brought by the appellant and not otherwise and no variation order under r 8 of the RCA can be made in respect of a non-existent appeal.

F

[38] It is important to keep in mind that there was no appeal filed by the appellants nor by the first to fifth respondents against the decision of the High Court allowing para 25(i) of the statement of claim. The appellants' appeal was against the decision to dismiss their claim for the balance of the land areas other than the cleared areas. There was therefore nothing to vary in terms of r 8 of the G RCA in respect of the decision of the High Court to allow para 25(i) of the statement of claim.

[39] The word 'vary' must be given its popular and ordinary meaning. The H *Shorter Oxford English Dictionary* (11th Ed) defines the transitive verb as meaning 'to cause to change or alter; to introduce changes or alterations into'. It cannot mean, by any stretch of the imagination, to discard entirely without leaving any trace of its original form. If legal colour needs to be given to the word, the following definitions may be helpful:

I

(a) to change in some usually small way; to make somewhat different; to cause to alter; to transmute; to be altered in some way; to become different (of things fundamentally similar) to differ in details; to be subtly dissimilar; to be characteristically changeable or adaptive: *Black's Law Dictionary* 11th Ed;

(b) wide enough to cover an alteration of the provisions of a judgment, whether by the subtraction of old ones or the addition of new ones, including a provision for a temporary stay of execution: *National Westminster Bank Ltd v Humphrey* [1983] Lexis Citation 985;

(c) in its ordinary meaning the word is clear. It is a departure from a former position. The term 'vary' means to change or to alter, and this plain meaning is endorsed by the definitions from the dictionaries. The word 'vary' is defined in the *Concise Oxford English Dictionary* (10th Ed) Revised, as:

> 1. differ in size, degree or nature from something else of the same general class.
>
> 2. change from one form or state to another.': *O'Farrell and others v Rafferty and another* [2016] IESC 37; [2016] 3 IR 619;

(d) if a mere increase of the amount is a variation, mere decrease also must be a variation: *Re Sebag-Montefiore, Sebag Montefiore v Alliance Co Ltd* [1944] Ch 331 per Lord Greene MR;

(e) probably it is enough to say that to vary the terms of the award is to change them in part whether by addition, by excision, by modification or by substitution or by qualification or otherwise: *R v Tonkin ex p Federated Ship Painters' Union* [1954] ALR 777; and

(f) to interpret the word 'vary' as conferring on the Director a wide power (as the judge found) to 'decrease', reduce and for that matter, revoke or cancel' a period of stay granted to a visitor under s 22(1) would import into the context of s 22 a meaning that Parliament had not intended: *Rufa v R and another* (2018) 92 WIR 46, a decision of the Court of Appeal of the Commonwealth of the Bahamas in dealing with s 22(3) in its context within s 22, as well as within the wider context of the Bahamas Immigration Act (Cap 191).

[40] What is more important in the whole scheme of things is that by not appealing against the decision of the High Court allowing para 25(i) of the statement of claim, the respondents must be deemed to accept the High Court's substantive finding of fact that the appellants and/or those whom they represent have acquired and/or created communal NCR over the cleared areas. This substantive finding of fact cannot be reversed or set aside without being re-heard by way of a substantive appeal under r 5 of the RCA. By not appealing against the decision, the respondents are estopped from contending that the decision is wrong and ought to be reversed or set aside.

[41] The jurisdiction of the Court of Appeal to determine civil appeals is conferred by s 67(1) of the Courts of Judicature Act 1964 ('the CJA') which stipulates as follows:

A 67 *Jurisdiction to hear and determine civil appeals*

(1) The Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter, whether in the exercise of its original or of its appellate jurisdiction, subject nevertheless to this or any other written law regulating the terms and conditions upon which such B appeals shall be brought.

[42] Section 69(1) of the CJA further provides:

69(1) Appeals to the Court of Appeal shall be by way of re-hearing, and in relation C to such appeals the Court of Appeal shall have all the powers and duties, as to amendment or otherwise, of the High Court, together with full discretionary power to receive further evidence by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner.

(2) The further evidence may be given without leave on interlocutory applications, D or in any case as to matter which have occurred after the date of the decision from which the appeal is brought.

(3) Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, the further evidence, save as to matters subsequent as aforesaid, shall be admitted on special grounds only, and not without leave of the Court of Appeal.

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(4) The Court of Appeal may draw inferences of fact, and give any judgment, and make any order which ought to have been given or made, and make such further order or other orders as the case requires.

(5) The powers aforesaid may be exercised notwithstanding that the notice of appeal F relates only to part of the decision and the powers may also be exercised in favour of all or any of the respondents or parties although the respondents or parties have not appealed from or complained of the decision.

[43] Subsection (5) above cannot be interpreted to mean that the appellate G jurisdiction of the Court of Appeal extends to the setting aside of the decision of the High Court that is not the subject of an appeal by the appellant. Such construction will defeat the whole purpose of r 5 of the RCA read with s 69(1) of the CJA, thus rendering the two provisions completely redundant and denuded of all meaning.

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[44] The powers under sub-s (5) is only to be exercised when the court is dealing with appeals under r 5 of the RCA. The question of exercising such powers does not arise where there is no appeal by the appellant, in this case by the appellants against the decision of the High Court to allow para 25(i) of I their statement of claim.

[45] Further, s 67(1) of the CJA provides that the jurisdiction of the Court of Appeal to determine appeals from the judgment of the High Court is 'subject nevertheless to this or any other written law regulating the terms and

conditions upon which such appeals shall be brought'. Rules 5 and 8 of the RCA are two such 'written law'. We have reproduced r 5 which deals with appeals earlier in this judgment. We now reproduce r 8 which deals with cross-appeals. It provides as follows:

> Rule 8. Notice of cross-appeal.
>
> (1) It shall not be necessary for a respondent to give notice of appeal, but if a respondents intends, upon the hearing of the appeal, to contend that the decision of the High Court should be varied, he may, at any time after entry of the appeal and not more than ten days after the service on him of the record of appeal, give notice of cross-appeal specifying the grounds thereof, to the appellant and any other party who may be affected by such notice, and shall file within the like period a copy of such notice, accompanied by copies thereof for the use of each of the Judges of the Court.
>
> (2) Notice of cross-appeal shall be substantially in Form 2 of the First Schedule.
>
> (3) If the respondent fails to give such notice within the time prescribed, he shall not be allowed, except by leave of the Court, to contend at the hearing of the appeal that the decision of the High Court should be varied; but the Court may in its discretion hear any such contention and may, if it thinks fit, impose terms as to costs, adjournment or otherwise.

[46] The RCA therefore differentiates between appeals and cross-appeals. Appeals under r 5 are meant for re-hearing of the decisions appealed against by the appellant, which may be reversed or set aside in their entirety. Cross-appeals under r 8 on the other hand are only meant for variation of the decisions appealed against and not for their total reversal or setting aside. The objects of the two provisions are different. The forms to be used are also different. Appeals under r 5 are to be filed using Form 1 whereas cross-appeals under r 8 are to be filed using Form 2.

[47] The words 'hearing of the appeal' in r 8(1) of the RCA refer to the hearing of the appeal filed by the appellant and the words 'decision of the High Court' in the same sub-rule refer to the decision of the High Court that is appealed against by the appellant. It needs to be reiterated, at the risk of being repetitious, that the decision of the High Court that was appealed against by the appellants in the present case was the decision to dismiss their claim for the balance of the land areas, and not the decision to allow para 25(i) of their statement of claim.

[48] The respondents' cross-appeals were therefore incompetent as they were directed at the decision of the High Court which the appellants did not appeal against pursuant to r 5 of the RCA, which was the decision to allow

A para 25(i) of the statement of claim. Simply put, there was no such appeal before the Court of Appeal for any variation order to be made under r 8 of the RCA, let alone for a setting aside order.

B **[49]** If at all any variation order is to be made under r 8, it will be in respect of the decision of the High Court that the appellants were appealing against, which is the decision to dismiss their claim for the balance of the land areas. It may of course be argued that there is nothing to vary with respect to that part of the decision as it was not a decision that the respondents were not satisfied with. That may be so, but that is precisely the reason why the first to fifth respondents should have appealed against the decision of the High Court allowing para 25(i) of the statement of claim, instead of attacking it collaterally by way of cross-appeal.

D **[50]** Rule 8(3) of the RCA prohibits a respondent who fails to give notice of cross-appeal to the appellant and any other party affected by such notice from challenging the decision of the High Court without leave of the Court of Appeal. While it is true that the respondents had indeed given notice of their cross-appeals to the appellants, their notices of cross-appeal were bad in law and of no effect as they were against the decision of the High Court which the appellants did not appeal against and therefore not falling within the ambit of r 8 of the RCA.

F **[51]** As for the sixth to eight respondents, they were in a worse position than the first to fifth respondents as they were not even parties to the High Court action, either as defendants or as interveners. It would be grossly unfair to the appellants if a decision is made in the sixth to eight respondents' favour when their claim for NCR rights over certain parts of the cleared areas, which had been decided in the appellants' favour after a full trial, was not even adjudicated upon by the High Court. The appellants have therefore raised a valid complaint that the Court of Appeal was wrong in allowing the sixth to eight respondents' cross-appeals.

H **[52]** For all the reasons aforementioned, our answer to the leave question is in the negative, that is to say, the Court of Appeal did not act within its jurisdiction when it set aside the whole of the order or decision of the High Court, including that part which decided that 'the Plaintiffs have acquired and/or created communal native customary rights over the said land and are still the lawful proprietors of the same for the specific patches of cleared areas labeled as Nos 4, 5, 9, 16, 25, 36, 37, 38 and 39 in exh D80 and the cleared area labeled as No 7 in exhibit D81' which was not appealed against, in determining the cross appeals brought by the defendants and the interveners.

[53] In the circumstances, the appeal is allowed with costs. The decision of

the Court of Appeal is set aside and we restore the decision of the High Court to allow para 25(i) of the statement of claim.

Appeal allwed with costs, decision of Court of Appeal set aside and decision of High Court reinstated.

Reported by Ashok Kumar